19227

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 204.

JOHN G. FISCHER,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.

No. 18,803.

STATEMENT.

This cause comes here on writ of error to the Supreme Court of Missouri.

The cause originated as a civil proceeding before a police court in the city of St. Louis, where defendant (here plaintiff in error), was fined for a violation of city ordinance 18407, hereinbefore set out. Upon his appeal to the St. Louis Court of Criminal Correction the cause was tried *de novo* on an agreed statement of facts, hereinafter set out, and the court again found defendant (here plaintiff in error) guilty of a violation of said ordinance and he was fined one hundred dollars and costs. From this decision

he appealed to the Supreme Court of Missouri (the court of last resort under the State law), where the decision of the lower court was affirmed in an opinion by the court *in banc* (reported as City of St. Louis vs. Fisher, 167 Missouri, pages 654-665), and every contention of appellant ruled against him.

In all stages of the litigation plaintiff in error contended that said ordinance was void, amongst other reasons, because in conflict with the fourteenth amendment of the United States Constitution, and the case comes here on that ground, which is now the only point open for discussion.

The defendant in error is a municiapl corporation organized in pursuance of the provisions of the Constitution of Missouri, set out therein in Article IX, Sections 20 to 25 (to be found in Revised Statutes of Missouri for 1899, pages 102, 103, slightly amended in particulars immaterial here in 1901), which provisions granted to St. Louis the right to adopt a Charter, subject only to the limitation that it should be subject to and in harmony with the Constitution and laws of the State.

Of such a charter the Constitution provides the courts take judicial notice (Constitution of Missouri, Article IX, Section 21).

Pursuant to this grant of power, the people of St. Louis adopted its present Charter, which took effect October 22, 1876, and which has all the force and effect of a Charter emanating from the General Assembly, and which amongst other things, gave it the power by ordinance enacted through its Mayor and Municipal Assembly (the latter consisting of an upper house or Council, and a lower house or House of Delegates)

"to secure the general health of the inhabitants by any measure necessary, * * * to *prohibit the erection* of soap factories, stock-yards and slaughter houses, pig pens, *cow-stables and dairies,* coal oil and vitriol factories within prescribed limits, and to remove and *regulate the same;* and to regulate or prevent the carrying on of any *business which may be dangerous or detrimental to the public health,* * * * and to declare, prevent and abate *nuisances on public or private property* and the causes thereof * * *" (Charter of St. Louis, Article III, Section 26, subdivision sixth.)

Also "finally, to pass all such ordinances not inconsistent with the provisions of the Charter, or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city * * * and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars." (Charter, Article III, Section 26, subdivision fourteenth.)

In pursuance of the above enumerated powers (especially Article III, Section 26, subdivision sixth) the city duly enacted said ordinance, numbered 18407, approved April 6, 1896. The fifth section of said ordinance only is here attacked, hence we reproduce here only the title of the ordinance, and section fifth thereof, which are as follows:

"AN ordinance to regulate cow stables and dairies within the corporate limits of the city of St Louis, prescribing how they may be maintained, defining when they shall be deemed a nuisance, providing for their inspection by veterinary surgeons and sanitary officers, and fixing the salaries of the veterinary surgeons. Also, to repeal section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three, of article eight of chapter fourteen of the revised ordinances of the city of St. Louis of one thousand eight hundred and ninety-three.

Sec. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the Municipal Assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the Municipal Assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

The case was tried upon an agreed statement of facts in all the State courts, which is as follows:

"It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, the City of St. Louis, is a Municipal Corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the 16th day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the City of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of Ordinance No. 18407, of said City and State, said premises, buildings and stable were occupied and in use by a certain party other than this defendant for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said City and State. Sometime in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling

house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until sometime in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said City, on to the premises Nos. 7208 and 7210 North Broadway, said City, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said 16th day of November, 1898, without having first obtained permission so to do from the Municipal Assembly by proper ordinance as provided by Section 5, of Ordinance No. 18407, of City of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked 'Exhibit A,' which is attached to and made a part of this agreed statement of facts, is a full, true and correct copy of said Ordinance No. 18407, and may be considered in evidence in this cause."

The plaintiff in error now brings the cause here to review the decision of the Missouri Supreme Court, as hereinbefore stated, on the ground that said ordinance is unconstitutional because in conflict with that part of section one of the fourteenth amendment of the Constitution of the United States, which provides as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

BRIEF.

I.

(a) No question is open for the consideration of this court save whether the ordinance in question violates the Fourteenth Amendment to the United States Constitution. On all other points the plaintiff in error is concluded by the ruling of the State Supreme Court.

Barbier vs. Connolly, 113 U. S. 27, 29, 30, 32.
Wilson vs. Eureka, 173 U. S. 32, 35.
Crowley vs. Christensen, 137 U. S. 86, 92, 94.
Gundling vs. Chicago, 177 U. S. 183, 185.

(b) The only ground upon which plaintiff in error can plausibly urge the alleged unconstitutionality of the ordinance is his contention that it confers arbitrary power on the municipal assembly to grant or refuse permission to operate a dairy. And as to this the plaintiff in error is not in a position to raise the question. He made no application for a permit or license and of course has not been refused one. *Non constat* that the assembly would have refused an application. Whether the discretion of the assembly is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused permission.

Gundling vs. Chicago, 177 U. S. 183, 186.

II.

(a) But, assuming that the question may be raised by plaintiff in error, the requirement of the ordinance that he,

like every other person similarly situated, must first obtain the permission of the Municipal Assembly before establishing or maintaining a dairy within the limits of the City of St. Louis, does not operate as a violation of the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

Gundling vs. Chicago, 177 U. S. 183, 186.
Wilson vs. Eureka, 173 U. S. 32 and cases there cited.
Davis vs. Massachusetts, 167 U. S. 43, 48.
St. Louis vs. Galt, 77 Southwestern (Missouri Sup. Court, Nov. 25, 1903) 876, 879.
St. Louis vs. Fischer, 167 Mo. 654, 664.
Ex parte Fiske, 72 Cal. 124, 126 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356).
Slaughter House Cases, 16 Wallace 36, 80.
Barbier vs. Connolly, 113 U. S. 27, 32.
Crowley vs. Christensen, 137 U. S. 86 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356, on grounds in point here).

(b) The charter provisions (which are perfectly lawful—see Point III) confer on the city *express* power to *prohibit* altogether the erection or maintenance of cow stables and dairies as well as to remove and *regulate* the same. Under these provisions it is competent to impose, instead of absolute prohibition, the lesser restriction, upon all persons desiring to erect or maintain a dairy, of first obtaining permission so to do from the municipal assembly and mayor by ordinance. The maintenance of dairies and cow stables within the city limits is not an absolute right, but a privilege, and whether under the individual circumstances of each case the operation of a dairy in the particular locality may be advantageous or injurious to

the public is a question the determination of which is properly left to the discretion of the Municipal Assembly, and the ordinance is not for that reason void as conferring an arbitrary and unregulated power.

Wilson vs. Eureka, 173 U. S. 32, 35-37.

Davis vs. Massachusetts, 167 U. S. 43, 48 ("The right to absolutely exclude all right to use, necessarily inc'udes the authority to determine under what circumstances such use may be availed of, as the greater includes the less." p. 48.)

St. Louis vs. Fischer, 167 Mo. 654, 662.

Gundling vs. Chicago, 177 U. S. 183, 186-188.

Crowley vs. Christensen, 137 U. S. 86, 92 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356, on grounds applicable to this case).

Commonwealth vs. Parks, 155 Mass. 531, 532 ("What a municipality may forbid altogether, it may forbid conditionally, unless its written permission is obtained beforehand").

Quincy vs. Kennard, 151 Mass. 563 (prohibiting keeping of swine without the permission of the board of health first obtained).

In re Flaherty, 105 Cal. 558, 562.

Ex parte Fiske, 72 Cal. 124, 127-128.

Easton vs. Covey, 74 Md. 262 (distinguishing Mayor vs. Radecke 49 Md.) relied on by plaintiff in error.

Love vs. Judge, 128 Mich. 545 (distinguishing the Frazee case, 63 Mich. 396, relied on by plaintiff in error).

St. Louis vs. Howard, 119 Mo. 47.

St. Louis vs. Weber, 44 Mo. 547, 550.

State *ex rel* vs. Holt, 39 Mo. 521, 524.

Perry vs. Salt Lake, 7 Utah 143; s. c. 11 Lawy. Rep. An. 446.

Hine vs. New Haven, 40 Conn. 478.
Commonwealth vs. Davis, 162 Mass. 510.

See also State *ex rel* vs. Schweickardt, 109 Mo. 496, 514 (holding that under many circumstances privileges may be granted by statutes or ordinances to specified individuals without violating any constitutional privilege, and upholding an ordinance to that effect: p. 514).

(c) Where the determination of the question whether the pursuit of a certain occupation, which may or may not be a nuisance according to conditions and circumstances, is left to the discretion of the Municipal Assembly, the presumption is indulged by the courts that such body will make the proper investigation and act impartially, not that it will favor one and discriminate against another, or exercise its powers for purposes of profit or oppression. Such favorable presumptions are constantly indulged in regard to legislative action.

City of St. Louis vs. Fischer, 167 Mo. 654, 663.
City of St. Louis vs. Howard, 119 Mo. 47, 50.
In re Flaherty, 105 Cal. 558, 562.
Ex parte Fiske, 72 Cal. 125, 127.
Perry vs. Salt Lake City, 7 Utah 143; s. c. 11 Lawy. Rep. An. 446, 448.

See also Soon Hing vs. Crowley, 113 U. S. 703, 710 ("The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments").

(d) The possibility of the abuse of legislative power

does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist.

> Powell vs. Pennsylvania, 127 U. S. 678, 686.
> Williams vs. Mississippi, 170 U. S. 213, 225.
> Verdin vs. St. Louis, 131 Mo. 26, 130, per Sherwood, J., citing Powell vs. Pennsylvania *supra.*
> Crowley vs. Christensen, 137 U. S. 86 ("As in many other cases, the officers may not always exercise the power [to grant certain licenses] conferred on them, with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States": p. 91-92).

There must always be lodged somewhere and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage.

> Powell vs. Pennsylvania, *supra,* p. 685.
> Yick Wo vs. Hopkins, 118 U. S. 356, 370.

(e) There is no hint or suggestion that discrimination or injustice is, or is intended to be, exercised under the ordinance in question.

As it does not appear upon the face of the ordinance, or from any facts in evidence or of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, or that there is any unjust discrimination, the legislative determination of the questions

of public policy requiring its enactment is conclusive upon this court and forms no subject for Federal interference.

Powell vs. Pennsylvania, 127 U. S. 678, 684.
Gundling vs. Chicago, 177 U. S. 183, 187-188.
Capital City Dairy Co. vs. Ohio, 183 U. S. 238, 246.
State vs. Layton, 160 Mo. 474, 498.

III.

(a) The ordinance in question is a valid exercise of the police power expressly delegated by the State to the City. The Fourteenth Amendment was not designed to interfere with the exercise of the police power by the States, and nothing in that amendment has shorn the States of their police power to prohibit or regulate trades and occupations which are or may be unwholesome, nor of regulating the use of property so as to guard against a use which is injurious to the community.

Davis vs. Massachusetts, 167 U. S. 43, 47.
St. Louis vs. Fischer, 167 Mo. 654, 664.
Slaughter House Cases, 16 Wallace, 36, 62, 81.
Powell vs. Pennsylvania, 127 U. S. 678, 683.
Holden vs. Hardy, 169 U. S. 366, 392.

(b) The establishment and operation of dairies and cow stables within the limits of a crowded metropolis is the pursuit of an occupation that is not necessarily harmless and unobnoxious in its nature, but one that may be or may become offensive, obnoxious and unsanitary to the community; its prohibition (*a fortiori* regulation) is within the police powers of the State, which the State may, and in this case has, delegated to the municipality. Even if the power had not been conferred (as it has been) by

express provision of the Charter, yet the ordinance in question would have been a valid exercise of the Police Power under the General Welfare Clause (Art. III, sec. 26, par. 14). The police power is universally conceded to include everything essential to the public safety, health, comfort and morals; and beyond this the State may interfere wherever the public interests require it, and in this particular (while its determination of what is a proper exercise of the police powers is not conclusive, but subject to judicial supervision) a large discretion is necessarily vested in the legislative body to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, nor to confiscate property under the guise of a police law, yet a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice not only in the subject matter, but in the means employed.

Lawton vs. Steele, 152 U. S. 133, 136, 140.

Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.

St. Louis vs. Galt, 77 Southwestern 876, 879 (Sup. Court Missouri, Nov. 25, 1903, not yet officially reported).

State vs. Broadbelt, 89 Md. 565, 577, 586 (upholding police regulations as to dairies and discussing numerous authorities, State and Federal).

Ferrenbach vs. Turner, 86 Mo. 416, 420 ("The courts ought not to interfere with municipal bodies in the legitimate exercise of those powers by which the peace, health and comfort of the inhabitants are secured," p. 421).

Crowley vs. Christensen, 137 U. S. 86, 89 (See also p. 91 "A business attended with danger to the community may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on. * * * It is a matter of legislative will only").

Gundling vs. Chicago, 177 U. S. 183 (p. 188: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference").

In re Linehan, 72 Cal. 114 ("The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation; and within certain limits may be detrimental to health and dangerous to public safety," p. 116).

Tiedeman on State and Federal Control of Persons and Property (1900), vol. 2, p. 730, sec. 145 (pointing out that the legislature may prohibit acts or trades as unwholesome or annoying, which the courts in the absence of statutes would hold permissible; and that "granting that the act or trade produces discomfort or injury to health, it is ultimately a legislative question whether the public welfare requires the imposition of this burden." Dairies are within this range: *ib.* p. 731).

Parker and Worthington on Public Health and Safety (1892), sec. 254, pp. 291-292: ("The power of the governing authorities, even in respect of noxious and offensive trades, extends further than such means of regulating them; they may be entirely prohibited within the corporate limits, though it is doubtful if such entire prohibition would be permissible under an authority merely to 'regulate' unless the trades or occupations constitute nuisances in fact. There is no doubt, however, that even under such a grant it would be a reasonable and proper *regulation* to prohibit the carrying on, without the consent of the local authorities of any trade or occupation which however lawful and innocuous in itself *may become* in its ordinary exercise a public nuisance.")

(c) Stricter police regulations are essential to the welfare and safety of a crowded metropolis than are required in the sparsely peopled portions of the country, and which would be wholly unnecessary and intolerable in the latter. Every man who selects urban life necessarily gives up cer-

tain natural rights that would pertain to life in the country.

St. Louis vs. Galt, *supra.*
Ex parte Cheney, 90 Cal. 617, 620.

"The tendency of modern development is in the direction of greater rather than more restricted police power, and necessarily so in order to meet the new dangers and increase of old dangers constantly occurring as natural incidents of advancing civilization."

Valliant, J., in Westport vs. Mulholland, 159 Mo. 86, 94, quoting from a Wisconsin opinion.

"Changing civic conditions will justify the permission of an evil or nuisance at one time, and call for its suppression at a later day. * * * The same experience is met with in the keeping of cows, pigs, and other animals in small towns, on the premises of one's dwelling. This may be permitted in a town which is sparsely settled and large yards surrounding each dwelling, without endangering the public health to any very serious degree. But when the town becomes more thickly settled, and the large grounds are fast being divided into twenty-foot lots, the keeping of such animals on the premises becomes a serious nuisance, which may be restricted or prohibited altogether."

Tiedeman on State and Federal Control of Persons and Property (1900), Vol. 2, pp. 730, 731.

ARGUMENT.

Constitutionality of Ordinance Is the Only Question.

The ordinance in question was upheld against every contention made by the plaintiff in error by the highest tribunal in the State. This puts to rest every point raised except the unconstitutionality of the ordinance on the ground of its violation of the Fourteenth Amendment.

This court will therefore not consider the contention that the ordinance does not apply to the premises in question, which at one time had been used by another than plaintiff in error for dairy purposes with permission by the Assembly, but were then abandoned for dairy purposes for six months, and thereafter were sought to be occupied by plaintiff in error again for a dairy without a new permit, he simply moving his cows there from another locality. The State court held that once having been abandoned, the status as dairy premises was lost and could not be restored without permission anew (167 Mo. 665). Even if this ruling were reviewable, it is so obviously correct (since the conditions and surroundings may meanwhile have changed) that it requires no argument in this court.

The same is true as to the proper interpretation of the Charter on the point whether the authority therein given to prohibit "within prescribed limits" may extend to the entire city limits. The interpretation of the State court on this point is obviously correct, but at all events is not a subject for review here.

So, also, for the same reasons the question whether there is a delegation to the municipality of the State power to

prohibit or regulate the operation of dairies, is not here open for argument.

There is nothing for this court therefore except to say whether the ordinance is in violation of the Fourteenth Amendment (and even on that point it is debatable whether plaintiff in error can be heard, since he has never been denied permission by the Assembly—see Point I of antecedent brief).

Dignity of the Ordinance as a Law.

In discussing the constitutionality of this ordinance it is to be borne in mind that the same principles and considerations apply as in the case of a statute passed by the State legislature.

As appears in our statement, the State Constitution provides for the organization of the City of St. Louis by charter; the Charter provisions (except if inconsistent with the Constitution or laws of the State, which, as decided by the State Supreme Court, is not the case here, and which decision is conclusive on that point), are direct delegations of State power to the municipality, and the ordinances enacted by the Municipal Assembly in pursuance thereof, so long as they are in the legitimate sphere of municipal affairs, are entitled to the same force and effect and the same intendments and discretionary scope as are accorded to enactments of the General Assembly.

St. Louis vs. Foster, 52 Mo. 513 (where the court says, p. 515: "A city council is a miniature general assembly, and their authorized ordinances have the force of laws, passed by the legislature of the State.")

Verdin vs. St. Louis, 131 Mo. 26, 117-118 (Sher-

wood, J., quoting the last extract, and referring to other similar decisions placing ordinances and statutes on the same plane, on these questions).
Barber Asphalt Co. vs. French, 158 Mo. 534, 547 (atfirmed 181 U. S. 324).
St. Louis vs. Fischer, 167 Mo. 654, 660.
Kansas City vs. Oil Co., 140 Mo. 458, 467 *et seq.*
State ex rel vs. Lindell Ry., 151 Mo. 162.

The Ordinance Is a Valid Police Law.

We defer for a moment the consideration of the charge that the *manner* of the regulation or *quasi* prohibition provided in this ordinance confers unregulated arbitrary power on the Municipal Assembly not warranted by law, in order to first call attention that the *right itself* of the State (here acting through the city) to regulate, and even, if the point were involved here, to prohibit altogether, *within the limits of the city,* the operation of dairies, admits of little doubt. The authority in the Charter is conferred in the same clause which refers to subjects of a similar nature—"soap factories, stock-yards, slaughter houses, coal oil and vitriol factories," etc., and suppression of nuisances. The ordinance is within the legitimate exercise of the Police Power of the State in protecting the health, comfort and safety of its citizens.

The maxim *sic utere tuo ut alienum non laedas* may apply with full force to the maintenance and operation of dairies and cow stables within the limits of a populous city.

It is an occupation the pursuit of which is not necessarily harmless, inoffensive and sanitary in its effects on the community. Without stopping to elaborate details it is at once suggested to the mind that the conditions inseparable

from such pursuit may, especially in a city, be not only obnoxious and offensive to the physical senses, but may under many probable circumstances engender disease and facilitate its dissemination amongst the people.

It is claimed that dairies and cow stables are not nuisances *per se* and therefore cannot be prohibited by ordinance as if they were nuisances. But it cannot be disputed that it is within the power of the State to prohibit the carrying on of any trade or business which, while not in itself a nuisance, may become such or may be of such a character as to be or become obnoxious to the neighborhood.

Thus in the case of Linehan, 72 Cal. 114, on p. 116, the court says:

> "Subjects to Constitutional limitations, legislative authority extends to the suppression or regulation of those things which are hurtful to the general good, and, as a general rule, *the law making power will be deemed the exclusive judge of what is or is not hurtful.* The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation; and within certain limits, may be detrimental to health and dangerous to the public safety."

So Professor Tiedeman in his late work on State and Federal Control of Persons and Property (1900), vol. 2, pp. 730-731, says that "through the interference of the *legislature* the doing of acts may be prohibited on the ground of being nuisances, which otherwise have been held to be permissible because of the public benefit resulting from thse acts." And he also adds that though the *courts,*

independently of statute, may determine that the public benefit from a certain unwholesome or annoying trade far outweighs the personal discomfort or injury to health which attends the prosecution of the trade, and for that reason refuse to prohibit its operation, that yet "the *legislature* is not precluded from reaching a different conclusion. Granting that the act or trade produces discomfort or injury to health, it is ultimately a *legislative* question whether the public welfare requires the imposition of this burden. No one has a natural right to do that which injures another. It is quite a common experience for the legislature either to prohibit altogether or to regulate the doing of that which works an annoyance or injury to others." And again, on p. 731, he cites the very instance here in question: "But when the town becomes more thickly settled and the large grounds are fast being divided up into twenty-foot lots the keeping of such animals [i. e., cows, pigs, etc.] on the premises becomes a serious nuisance, which may be restricted or *prohibited altogether,* according to the demands of public opinion."

Parker & Worthington on Public Health and Safety (1892) say in s[illegible] 254, pages 291-292: "But the power of the governing authorities, even in respect of noxious and offensive trades, extends further than such means of regulating them: they may be *entirely prohibited within the corporate limits,* though it is doubtful if such entire prohibition would be permissible under an authority merely to 'regulate,' unless the occupations constitute nuisances in fact. There is no doubt, however, that even under such a grant of authority it would be a reasonable and proper *regulation* to prohibit the carrying on, *without the consent of the proper local authorities,* of any trade or occupation which, however lawful and innocuous in itself, *may become in its ordinary exercise a public nuisance.*"

A reference to the decisions of this court shows not only that they recognize fully the right of the State to enact such Police Laws as above and here in question, but also that in cases not clearly falling within the ordinary Police Power, this court will yet, where the object sought to be accomplished is conducive to the public interest, accord to the legislative body a large discretion and liberty of choice to determine what the interests of the public require and what measures are necessary for the protection of such interests, and uphold the same unless so unreasonable and extravagant as to unnecessarily and arbitrarily interfere or destroy without due process of law the personal rights or property of the citizen.

Lawton vs. Steele, 152 U. S. 133, 136, 140.
Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.
Gundling vs. Chicago, 177 U. S. 183, 188.
Crowley vs. Christensen, 137 U. S. 86, 89, 91.

The ordinance in question was therefore clearly within the police power of the city conferred by law on it, and the only contention that need be noticed is that the *manner* of its exercise (calling for permission in each case to be granted by the Municipal Assembly before the establishment or operation of dairies or cow stables becomes lawful), confers such unlimited and arbitrary power on the Assembly as to operate as a violation of the Constitution in denying the equal protection of the laws. It is argued that the Assembly may under the ordinance arbitrarily grant to A what it denies to B under the same circumstances, and thus unjustly favor one and discriminate against another, without any common measure applicable to all.

The means employed in the ordinance are Constitutional—not arbitrary nor unreasonable.

As to this point the authorities last referred to are also in point. "If the object to be accomplished is conducive to the public interests, the legislature may exercise a large liberty of choice as to the means employed."

Lawton vs. Steele, 152 U. S., on p. 140.

Again, what this court has said in another case may not be improper in view of the contention here made of Fischer and Schefe:

> "The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property; and while, according to the principles upon which our institutions rest 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself,' yet 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.' "

Powell vs. Pennsylvania, 127 U. S., pp. 685-686, quoting from Yick Wo vs. Hopkins, 118 U. S., upon which our opponents principally rely.

In the same case the court goes on:

> "It is argued, in behalf of defendant, that if the statute in question is sustained as a valid exercise of legislative power then nothing stands in the way of the destruction of the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not

disprove its existence. That possibility exists even in reference to powers that are conceded to exist."

See further authorities Brief, Point II (d).

The plaintiff in error has not shown nor pretended to claim that any improper discrimination has been made or contemplated under this ordinance, and, as shown above, the courts are not going to supply a presumption to that effect, simply because of a possible abuse. On the contrary, the presumption is that the legislative body will act fairly and impartially and not for the purposes of profit and oppression. See numerous authorities so holding cited *ante* in our Brief Point II, subd. (c).

And as said by this court:

"The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

Soon Hing vs. Crowley, 113 U. S. 703, on pp. 710-711.

In another case where the argument was made that arbitrary power was vested in an officer, this court said:

"The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. As in many other cases, the officers may not always exercise the power

conferred upon them, with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States."

Crowley vs. Christensen, 137 U. S., on pp. 91-92.

Other authorities to similar effect are cited *ante* in Brief.

Looking at the ordinance in question in the light of these general and reasonable rules of law, we think there can be no doubt that the discretion vested in the Assembly to permit or deny the privilege of conducting dairies and cow stables within the limits of the City of St. Louis is reasonable and proper, and should be upheld on the general principles above mentioned.

Coming now to more particular instances we find our contentions corroborated in a number of cases in which similar ordinances were upheld by this court against the insistence here made that they conferred arbitrary and unbridled authority on certain officers or bodies.

Necessarily "there must always be lodged somewhere, and in some person or body, the authority of final decision." (118 U. S., p. 370.)

Thus an ordinance was sustained as not in conflict with the Fourteenth Amendment which provided that no person should make any public address on any of the public grounds, except in accordance with a permit from the mayor.

Davis vs. Massachusetts, 167 U. S., 43.

Against the same contention that personal rights were submitted to the unrestrained discretion of a single individual and thereby removed from the domain of law, was upheld an ordinance prohibiting the moving of any building into or

upon any street or public place, without the written permission of the Mayor, President of the City Council or in their absence, a councillor.

> Wilson vs. Eureka City, 173 U. S. 32 (commenting upon a number of authorities).

So also objection on the same ground was overruled when made against an ordinance of the City of Chicago, which committed to the discretion of the Mayor the question whether a license should be issued or declined in each case for the sale of cigarettes.

> Gundling vs. Chicago, 177 U. S. 183 (distinguishing Yick Wo vs. Hopkins, on grounds equally applicable here).

A large number of other authorities, State and Federal, to the like effect are referred to in our Brief under Point II (b) and need not be repeated here.

Enough, we think, has been said to show the validity of this ordinance.

Cases cited for plaintiff in error distinguished.

The plaintiff in error thinks his position is supported by a number of cases, mainly by Yick Wo vs. Hopkins, 118 U. S. 356, Barthet vs. New Orleans, 24 Fed. 563, State vs. Mahner, 43 La. An. 496, *In re* Hong Wah, 82 Fed. 623, and Stockton Laundry Case, 26 Fed. 611. We think none of these cases support his contention as applied to the ordinance here in question.

In Yick Wo vs. Hopkins, an ordinance was condemned which prohibited the maintenance of laundries within the limits of San Francisco without first having obtained the

consent of the Supervisors of San Francisco, "except the same be located in a building constructed either of brick or stone."

One vital difference between the ordinance there considered and the one here in question is that in the former this court held that *there was no question of police regulation involved*. The court pointed out that the ordinance was not intended to guard against fire, or against danger or discomfort to the community; that the pursuit there inhibited in wooden houses was harmless and inoffensive and the police power was not in reality involved at all or only except as a manifest guise and pretext to furnish the supervisors an excuse to discriminate against the Chinese. In connection with this phase the court said:

> "We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinance in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The court also says:

> "The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

But the real decision in the case is based on the finding of the court that the ordinance was intended *solely* to exclude the Chinese and favor all others, and that the ordinance was being so applied.

In concluding the case the court says:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the said ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be

fair on its face and impartial in appearance, yet, if it is applied and administered by the public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson vs. Mayor, etc., of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U. S. 275; *Ex parte* Va., 100 U. S. 339; Neal vs. Delaware, 103 U. S. 370, and Soon Hing vs. Crowley, 113 U. S. 703.

"The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. *No reason whatever,* except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their *harmless and useful occupation,* on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. * * *."

It at once strikes the mind that none of the essential features on which the court condemned that ordinance are present in the one here considered.

The case of Barthet vs. New Orleans is also distinguishable. There on an application for a temporary injunction, a Federal *nisi prius* judge held invalid an ordinance prohibiting the maintenance and operation of slaughter houses within certain limits of the city "except permission be granted by the council of the City of New Orleans."

In the first place it will be noted at once that there is a difference between that ordinance and the ordinance under discusssion. The ordinance we are considering prohibits cow stables and dairies without permission of the municipal assembly, *by ordinance*. This implies, of course, strict legislative action and concurrence by the mayor. The charter of the City of St. Louis provides how ordinances shall be enacted, and requires the concurrent action, not only of both branches of the municipal assembly, but also of the mayor. In the New Orleans case, slaughter houses were authorized to be maintained and operated only on *permission* of the council. This permission might be obtained otherwise than by legislative action; for instance, by mere resolution not requiring the concurrence of the executive, or perhaps by mere sanction given by the members of the council. In other words, the law-making body of the city undertook to delegate its powers of legislation to the members or individuals composing it. This would be in truth and in fact a delegation of legislative power *to others*. In the ordinance which is involved in this case, there is no delegation of the power which is delegated by the State to the Municipal Assembly of the City of St. Louis. The assembly is itself to determine by the usual proper legislation, that is by ordinance, when a cow stable or dairy may or may not be established and conducted. Thus the assembly is itself, and not through others, even though they be the very members of the body itself, exercising the power granted by the charter.

But the Barthet case was decided on other grounds.

Attention is called in the very opening sentence of the opinion to the fact the Article 258 of the Louisiana Constitution prohibits monopolies, and that Article 248 invests the City of New Orleans with power to regulate the slaughtering of cattle within its limits, provided no monopoly or exclusive privilege exists within the State. Attention is also called by the court to the fact that the plaintiff, acting under an ordinance of the City of New Orleans, invested large sums of money in the erection of buildings suitable for the slaughtering of cattle for food, and that after he had done so, and had *"in good faith acquired vested rights,"* the ordinance of the city was amended so as to make it unlawful to maintain slaughter houses within certain limits, embracing his, except upon permission granted by the council. The court holds that this amendment conflicts with the Louisiana State Constitution. The court says:

> "The city council has the right generally in the exercise of governmental powers such as belong to municipal corporations, to regulate the business of slaughtering animals for food," thus recognizing the rule for which we here contend, and then continues: "But under the articles 248 and 258, State Constitution—responsive as those articles are to a public sentiment long offended in this city by oppressive monopolies in the slaughtering of animals for food—it must be apparent that the city cannot directly or indirectly prohibit the business of this complainant under the pretense of exercising an ordinary governmental police power. It is clear that those articles were intended to prohibit all monopolies, and to limit rather than enlarge the police powers of the city in relation to slaughtering cattle, etc., and if the city can refuse to permit Barthet to carry on his business, it can adopt the same course with others. *By giving its permission to an individual or to a corporation, and refusing it to all others, a monopoly could be established by the favored suitor.*"

The foregoing indicates very plainly that the court recognized the general police power of the city, but concluded that it might be so abused as to create a monopoly, in violation of the State Constitution. So far as the court undertakes to suggest that the ordinance may be void, merely because the council might withhold permission from all but one favored applicant, and thus create a monopoly, it comes into conflict with the decisions of this court that an ordinance or law will not be held invalid simply because its provisions may be abused. Rather will the court indulge in the proper presumption that the law making body will, like all officers, act in good faith and upon the exercise of a proper judgment and discretion, than that it will take advantage of its powers and abuse them. If any presumption is to be indulged in, in connection with the ordinance here attacked, it is that the municipal assembly will, by ordinance, grant permission for the erection or maintenance of dairies or cow stables in all proper cases, and will withhold such permission whenever it would operate injuriously on the rights of others.

State vs. Mahner, 43 La. An. 496 is another of the cases principally relied on in attacking the ordinance. That case differs from this because here express power to prohibit dairies altogether is conferred on the city, and the ordinance now in question is a police regulation in the public interest. In the Louisiana case the court based its decision on the ground that that ordinance "was not enacted in the interest of the public health," nor did the court "consider the right or power of the city to *prohibit* dairies within the city limits." "The permission to keep dairies within the limits negatived the view that the ordinance was enacted in the interests of the public health." There was in that case no right to prohibit *in toto*.

At all events if the case were in point it would not be in ac-

cord with the decisions of this court and many others including Missouri.

> The case of *In re* Hang Wah, 82 Fed., 623, is one in which the court (as in Yick Wo vs. Hopkins) found that there was no reasonable ground to invoke any police regulations, the vocation there inhibited in certain localities (the laundry business) being held to be necessarily harmless and inoffensive and not furnishing any basis for the regulation attempted, and that no question of the exercise of the police power was therefore involved.
>
> The Stockton Laundry Case, 26 Fed., 611, is distinguishable on the same ground. This is apparent from what the court says (p. 611), speaking of the laundries prohibited under the ordinance: "All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive. It makes no difference what the character of the work is."
>
> It is evident that these cases are wholly different in their facts and the spirit of the ordinance, from the one at bar.

Many other of the authorities of plaintiff in error have been distinguished in later cases on grounds equally applicable here, some instances of which are indicated in the citations in our Brief. It is always well to remember that each case involving the validity of a police regulation depends largely on its own circumstances; for, as has been said, "It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers." (170 U. S. 45; 158 Mo. 540).

The ordinance in question here is a bona fide police regulation, duly authorized by the Charter; and in view of its manifest purpose when interpreted in the light of the prevailing conditions, it is absolutely justifiable.

We submit the decision of the Supreme Court of Missouri was right and should be affirmed.

Respectfully submitted,

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